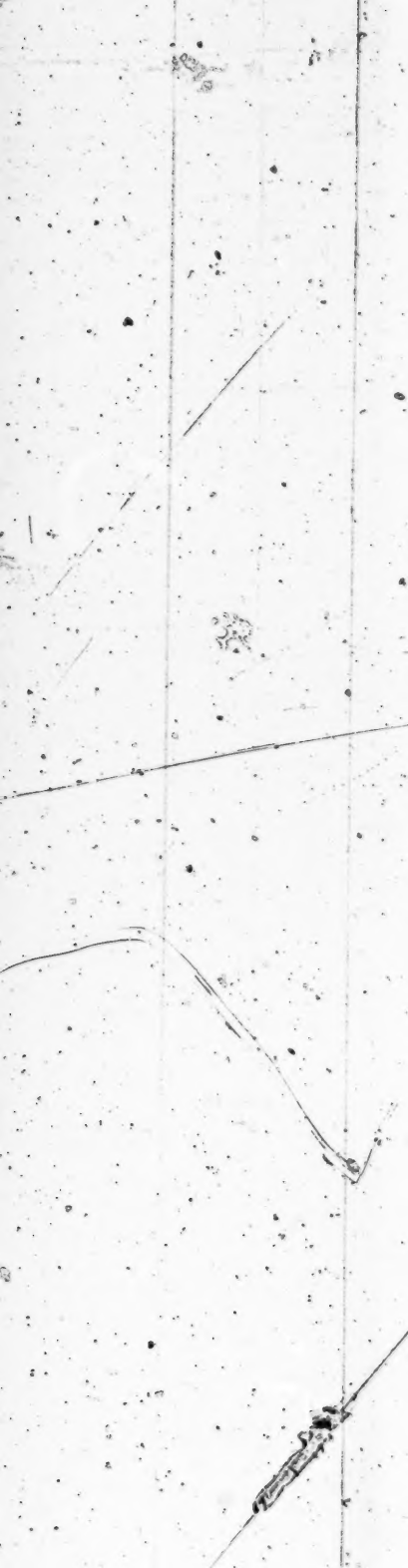

INDEX

	Page
The Decision of the Supreme Court of Alaska Rests on an Adequate Non-Federal ground	1
The Question Presented by Petitioners is of Isolated Significance	3
The Decision of the Supreme Court of Alaska is Not in Conflict with the Decisions of This Court	5
Conclusion	10

INDEX OF CITATIONS

CASES:

Albertson v. Millard, 345 U.S. 242 (1963)	2
Beilan v. Board of Educ., 357 U.S. 399 (1958)	7, 9, 10
Board of Educ. v. Swan, 41 Cal. 2d 546, 261 P.2d 261 (1953), cert. denied, 347 U.S. 937 (1954)	8, 10
Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961)	2
District of Columbia v. Sweeney, 301 U.S. 361 (1940)	5
Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 38 Cal. Rptr 625, 392 P.2d 385 (1964)	5, 7
Garrison v. Louisiana, 379 U.S. 64 (1964)	6
Henry v. Mississippi, 379 U.S. 443 (1965)	3
Jepsen v. Board of Educ., 19 Ill. App. 2d 204, 153 N.E. 2d 417 (1958)	3
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	4, 5
United Public Workers of America v. Mitchell, 330 U.S. 75 (1947)	5
Watts v. Seward School Bd., 421 P.2d 586 (Alaska 1966)	2, 6, 7
Wolfe v. North Carolina, 364 U.S. 177 (1960)	3

STATUTES:

5 U.S.C. §652 (a) (1965) 7

Alaska Code of Laws Annotated 1949, Section 37-5-12 (b) (Cum. Supp. 1957) 4

Session Laws of Alaska (1966), ch. 104, §2 4

Alaska Statutes 14.20.170 (a) 4

REGULATIONS:

Seward School Board Regulation E(7) 1, 2, 3

IN THE

Supreme Court of the United States

October Term, 1967

No. 325

JAMES A. WATTS AND WALTER B. BLUE, *Petitioners*,

v.

SEWARD SCHOOL BOARD AND BOARD OF EDUCATION, APPEAL HEARING COMMITTEE, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

THE DECISION OF THE SUPREME COURT OF ALASKA RESTS ON AN ADEQUATE NON-FEDERAL GROUND.

Petitioners' teaching contracts were not renewed because, among other reasons, they substantially failed to comply with Seward School Board Regulation E(7). That regulation states:

> Grievances, complaints and communications from employees shall be submitted to the Board through the Superintendent. Any employee, or group of employees, may at any time appeal to the Board.

Petitioners violated this regulation by participating in the preparation and simultaneous distribution of an open letter to the Superintendent of the Seward School

Board, members of the Seward School Board, and members of the general public. *Watts v. Seward School Bd.*, 421 P.2d 586,601 (Alaska 1966). The open letter contained many grievances and complaints, none of which, with one possible exception, had previously been communicated to the Superintendent. 421 P.2d at 586. The Supreme Court of Alaska noted that the regulation required that grievances "should be submitted to the Board through the Superintendent. It provided a right of appeal from the Superintendent to the Board." 421 P.2d at 601. And in sustaining the Seward School Board's conclusion that that petitioners were guilty of substantial noncompliance with Board Regulation E(7) the Supreme Court of Alaska noted that not only had a substantial violation of the regulation taken place, but the purpose of the regulation, supplying an orderly process for deciding grievances, had been subverted by petitioners' conduct:

> The factual basis for the charges could have been verified by appellants if they had taken the time to do so. Appellants admittedly ignored established democratic procedure for obtaining redress. Instead, they attempted to arouse and inflame the public against the Superintendent and the School Board on charges which were largely untrue. They choose to attempt to substitute the mass meeting for the orderly process of hearing and appeal.

421 P.2d at 607.

Since the interpretation of state statutes and state administrative regulations is the function of state authorities, judicial and administrative[1], the decision of the Supreme Court of Alaska conclusively establishes that the petitioners' conduct was in violation of Seward School Board Regulation E(7).

A need for regulations which define and govern grievance procedure is not unique to the Seward School system, but is universally recognized as essential to

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1 Albertson v. Millard, 345 U.S. 242 (1963); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

orderly school administration. Even in the absence of a specific statute or regulation, an Illinois court has said:

> There can be no doubt that if a teacher is aware of a censorable infraction of interscholastic athletic regulations by his school he should seek to correct it. However, promotion of the best interest of his school dictates that he would first call it to the attention of the coaches and of his principal or superintendent of his school, and, failing action there, call it to the attention of the Board of Education, and then, if necessary, make a formal protest or report to the proper officials of the Illinois State High School Athletic Association.

Jepsen v. Board of Educ., 19 Ill. App. 2d 204, 153 N.E.2d 417, 420 (1958). In *Jepsen* the failure of a teacher to follow orderly channels in processing his grievance was held to be sufficient cause for his dismissal even in the absence of a regulation setting forth the specific procedure to be followed.

The Petitioners do not contend that regulation E(7) was unreasonable or outside the School Board's scope of authority. Nor have they contested the fact that their open letter of May 18, 1959, to members of the Seward School Board and to the general public was in direct violation of the policy and outlined procedure of regulation E(7).

It is a well established principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide Federal questions. *Henry v. Mississippi*, 379 U.S. 443, 446 (1965), *Wolfe v. North Carolina*, 364 U.S. 177 (1960). It is respectfully submitted that under the circumstances of this case there is an independent and sufficient state ground for the decision and that the decision therefore should not be disturbed.

THE QUESTION PRESENTED BY PETITIONERS IS OF ISOLATED SIGNIFICANCE.

Petitioners non-retention as teachers was based in part on conduct which was found to be immoral under the definition of that term contained in A.C.L.A. §37-5-12(b) (Cum. Supp. 1957). "Immorality" is there defined as "Conduct of the person attempting to bring the individual concerned or the teaching profession in public disgrace or disrespect". In 1962 this definition along with other previously existing non-retention provisions, was recodified as AS 14.20.170(a) which in 1962 read as follows:

> Dismissal. (a) A teacher, including a teacher who has acquired tenure rights, may be dismissed at any time for the following causes:
>
> Definition for cause: Causes for non-retention are
>
> (1) incompetency, which is defined as the inability or the unintentional or intentional failure to perform one's legitimate duties in a satisfactory manner;
>
> (2) immorality, which is defined as conduct of the person tending to bring the individual concerned or the teaching profession into public disgrace or disrespect;
>
> (3) substantial noncompliance with the school laws of the state or the regulations of the department or the applicable regulations of any other governmental agency or the employing school district.

In 1966 the Alaska Legislature enacted SLA 1966, ch. 104, §2 which amended 14.20.170(a)(2) and redefined immorality as "the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude." Of course, the result of this amendment is to remove from future cases the constitutional questions raised by petitioners.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), after a writ of certiorari had been granted to review an alleged denial of constitutional rights and after full argument on the merits, it was brought to the attention of the Court that since the commencement of

the litigation a statute had been enacted by the Iowa Legislature which precluded similar questions from ever arising again in the State of Iowa. The Court for this reason vacated its earlier decision on the merits and dismissed the writ of certiorari as being improvidently granted.

In the case at bar the statute of which petitioners complain has been changed. Just as in *Rice*, the case will never arise again and is of limited public significance. *Cf. District of Columbia v. Sweeney*, 301 U.S. 361 (1940).

THE DECISION OF THE SUPREME COURT OF ALASKA IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT

The Supreme Court of Alaska did not base its decision on the abstract proposition that public employment is a privilege not a right, nor on the theory that the power to withhold employment entirely includes the power arbitrarily to place conditions on employment when granted. Instead, the court held that the Seward School Board was justified in not renewing petitioners' contracts because their activities brought them and the teaching profession into public disgrace and undermined the morale and discipline of the local school system. Petitioners' discharge was sustained because of the specific finding that their activities threatened to impair the efficiency and integrity of the school system. This is an interest recognized by this Court in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947) as justifying restrictions on the otherwise constitutionally guaranteed rights of speech and association of government employees " 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action." 330 U.S. at 102. Even the state cases which petitioners assert to reflect constitutional philosophy antithetical to that of the Supreme Court of Alaska, have recognized the compelling interest of state agencies in preserving an efficient, harmonious internal administration. E.g., *Fort v. Civil Serv. Comm'n*, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385, 389 (1964), where the Court stated:

> A strong case, we think, can also be made for the view that permitting a public employee to run or campaign against his own superior has so disruptive an effect on the public service as to warrant restriction.

In the case at bar there can be no doubt of the divisiveness of petitioners' conduct.[2] Since petitioners do not dispute the conclusion of the school board that they engaged in activities damaging to their own and to their employer's professional prestige, it can only be assumed that they are arguing that in spite of their disruptive conduct which threatened to impair the efficiency and destroy the integrity of the school system, they cannot be denied employment within the school. This claim is without merit.

Moreover, petitioners' false statements for which they were dismissed are not entitled to constitutional protection since they were made with reckless disregard for truth. The Supreme Court of Alaska stated:

> The production and distribution of the Open Letter was a time-consuming and deliberate act. The false statements contained in it were not made in heated debate. The factual basis for the charges could have been verified by appellants if they had taken the time to do so.

421 P.2d at 607. Those are the elements of recklessness which, as noted by the Supreme Court of Alaska, renders a statement beyond constitutional protection. *Cf. Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

Nor is the statute under which petitioners were non-retained unconstitutionally vague or overbroad. The

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[2] *E. g.* In an attempt to discredit the superintendent, petitioner Blue in May or June of 1959 contacted and questioned at least three residents of the town where the superintendent had previously served concerning his character, administrative policies and personal habits while serving there. 421 P.2d at 599.

phrase, "conduct of the person tending to bring the individual concerned or the teaching profession into public disgrace or disrespect" was intended to be a "catch-all", serving the same purpose as phrases such as "conduct unbecoming a teacher" or "unprofessional conduct". 421 P.2d at 590. These phrases do cover a broad range of conduct; necessarily so because no statute could be framed to include with specificity all of the particular acts which might render a teacher unfit. The necessity of using a broad standard for dismissal is indicated by the fact that this technique is used in many states and by the Federal Civil Service.[3]

In attacking the constitutionality of such a technique, petitioner has misunderstood the fundamental difference between statutes which impose prior conditions on employment (oaths) or which prohibit specific activities (a county charter as cited in *Fort* case)[4] and statutes authorizing dismissal for cause with the right of a hearing. All of the cases petitioner cites deal with either prior conditions or specific acts that are prohibited. The constitutional defect in laws such as the county charter in the *Fort* case is plain. Specified kinds of political activity are prohibited; any hearing the employee gets

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3 5 U.S.C. §652 (a) (1965) reads:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service. . . .

See statutes cited in Beilan v. Board of Educ., 357 U.S. 399, 406 n.8 (1958) and accompanying text.

4 No officer or employee of the county in the classified civil service shall directly or indirectly make, solicit, or receive or be in any manner concerned in making, soliciting or receiving any assessment, subscription, or contribution for any political party or any poltiical purpose whatsoever.

Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 38 Cal. Rptr. 625, 392 P.2d 385, 386 (1964).

is only to see if he engaged in the prohibited activity. There is no judicial determination that his particular activity actually interfered with the internal functioning of the agency. Similarly, the requirements of an oath that an employee has never been a member of a political party is too broad and at times vague because, again the only question the employee can litigate is whether he signed the oath, or whether he was a member of a group. He has no chance to show that his membersip was innocent or that he personally did or does not share the illegal aims of the group. In such laws, the legislature has made the judgment that anyone who engages in the activity or fails to sign the oath, regardless of the actual circumstances, is unfit for public employment. This legislative judgment is what courts review when striking down the laws for vagueness or overbreadth. These laws must be drawn narrowly to assume that anyone who does engage in the activity will be actually unfit.

It is clear that when a hearing is granted under a "catch-all" phrase the question to be determined is unfitness in fact. In a dismissal hearing for "good cause" a court rather than determining whether the employee did any specific act which may or may not bear relationship to his ability to serve effectively must determine that the employee's actions render him unfit. In "dismissal for cause" cases the legislature has not made any judgment that a particular act renders an employee unfit. The legislature instead has entrusted agencies and courts with the task of finding whether a particular employee's actions constitute good cause for dismissal. This is a very specific procedure.

In the few cases where such a dismissal procedure has been attacked for vagueness or overbreadth it has been upheld.

In *Board of Educ. v. Swan*, 41 Cal. 2d 546, 261 P.2d 261, 266 (1953), *cert. denied*, 347 U.S. 937 (1954) the Court rejected an attack on the standard "unprofessional conduct" as being void for vagueness, with the following statement:

As was said in the Goldsmith case, 66 Cal. App. at page 168, 225 P. at page 787: '. . . the calling (of a teacher) is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment . . . the teacher is entrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. How can all these things be provided for and offenses against them be particularly specified in a single statute?

The question of vagueness, appears to be governed by *Beilan v. Board of Educ.*, 357 U.S. 399 (1958). In that case a teacher was dismissed under the disqualifying ground of "incompetency." His offending conduct was refusing to answer questions propounded by his superior in private concerning his possible association with communist groups. The teacher's contention that due process of law was violated by including his refusal to answer within the term "incompetency" was rejected by the Court. The Court mentioned that the Pennsylvania statute under which he had been dismissed, "unlike those of many other States, contains no catch-all phrase, such as 'conduct unbecoming a teacher,' to cover disqualifying conduct not included within the more specific provisions." 357 U.S. at 406. By inference then, it would have been constitutionally permissable to have dismissed the teacher under a catch-all standard. The Court proceeded to note that the term "incompetency" had been broadly interpreted by the Pennsylvania Court and that its dictionary definition was not particularly prescriptive. Since this was so, the Court held, the extension of the term "incompetency" to include the teacher's refusal to answer was not inconsistent with the United States Constitution.

The basic teaching of *Beilan* and *Swan* is that statutes setting forth all possible legitimate grounds for non-retention of teachers cannot be drafted. Because of this fact the use of general standards in non-retention statutes is constitutionally permissible.

CONCLUSION

For the foregoing reasons respondent prays that the petition for certiorari be denied.

Respectfully submitted

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Dated: August 2, 1967